

PROJECT NAME: Great Mall and Tasman/1880 Capacity Improvements

PROJECT NO.: 4178

DATE: April 20, 2004

19

**CONSULTING SERVICES AGREEMENT BETWEEN
THE CITY OF MILPITAS AND LOWNEY ASSOCIATES**

THIS AGREEMENT for consulting services is made by and between the City of Milpitas ("City") and Lowney Associates ("Consultant") as of April 20, 2004 in Milpitas, California.

DRAFT

AGREEMENT

Section 1. SERVICES. Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the date first noted above and shall end on December 31, 2005, the date of completion specified in Exhibit A, and Consultant shall complete all the work described in Exhibit A prior to that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as provided for in Section 8.
- 1.2 **Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement in the manner and according to the highest and best professional standards observed by a practitioner of the profession in which Consultant is engaged in the geographical area in which Consultant practices its profession. Consultant shall prepare all work products required by this Agreement in a substantial, first-class manner and shall conform to the highest and best professional standards of quality observed by a person practicing in Consultant's profession.
- 1.3 **Professional Skill.** It is mutually agreed by the parties that City is relying upon the professional skill of the consultant as a specialist in the work, and Consultant represents to the City that its work shall conform to the highest and best professional standards of the profession. Acceptance of the Consultant's work by the City does not operate as a release of Consultant's representations. It is intended that Consultant's work shall conform to the highest and best standards of accuracy, completeness and coordination.
- 1.4 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. Exhibit A shall name any specific personnel (including title and hourly charge rate) who shall be performing services. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.

- 1.5 **Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Section 1 above and to complete Consultant's obligations hereunder.

Section 2. COMPENSATION. City hereby agrees to pay Consultant an amount not to exceed \$ 27,000.00 for all services to be performed and reimbursable costs incurred under this Agreement. City shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consultant further represents that the amount of the compensation specified in this Section 2 shall be a *guaranteed maximum price*. Hourly rates for personnel performing services shall be as shown in Exhibit B. Consequently, the parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

- 2.1 **Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred during the billing period. Invoices shall contain the following information:

- Serial identification of bills; ("Invoice #")
- The beginning and ending dates of the billing period;
- A Task Summary containing the City project name and number, purchase order number, Project Manager, original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion, if applicable;
- Consultant shall use the City's "Consultant Progress Payment" format specified in Exhibit C for invoice tracking and shall submit the form with each invoice.
- At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
- The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant performing services hereunder, as well as a separate notice when the total number of hours of work by Consultant and any individual employee,

agent, or subcontractor of Consultant reaches or exceeds 800 hours, which shall include an estimate of the time necessary to complete the work described in Exhibit A;

- The Consultant's signature.

2.2 Monthly Payment. City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have thirty (30) days from the receipt of an invoice that complies with all of the requirements above and is otherwise acceptable to the City to pay Consultant. Ten (10) percent shall be retained by the City from each contract billing until the completion of the contract unless authorized differently by City. In the event that an invoice is not acceptable to the City, said invoice shall be returned to Consultant within thirty (30) days of the City's receipt of the invoice with a detailed explanation of the deficiency. City's obligation to pay a returned invoice shall not arise earlier than thirty (30) days after resubmission of the corrected invoice.

2.3 Total Payment. City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment. In the event that Consultant identifies additional work outside the scope of services specified in Exhibit A that may be required to complete the work required under this Agreement, Consultant shall immediately notify the City and shall provide a written not-to-exceed price for performing this additional work. Consultant shall not perform extra work without specific written City approval.

2.4 Hourly Fees. Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on Exhibit B.

2.5 Reimbursable Expenses. Reimbursable expenses included in Exhibit B. Expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses are included in the total not-to-exceed amount of compensation provided under this Agreement.

2.6 Payment of Taxes. Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any other applicable federal or state taxes.

- 2.7 **Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets in order to verify costs incurred to that date. The City shall have no obligation to compensate Consultant for work not verified by logs or timesheets.
- 2.8 **Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of a written Notice to Proceed from the City.

Section 3. FACILITIES AND EQUIPMENT. Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, cellular telephone, long-distance telephone, or other communication charges, vehicles, and reproduction facilities.

If the performance of the work specified in Exhibit A requires destructive testing or other work within the City's public right-of-way, Consultant, or Consultant's subconsultant, shall obtain an encroachment permit from the City.

Section 4. INSURANCE REQUIREMENTS. Before beginning any work under this Agreement, Consultant shall procure "occurrence coverage" insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce said policies to the City upon demand. The cost of such insurance shall be included in the Consultant's price. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence thereof to City. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution.

- 4.1 **Workers' Compensation.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability

Insurance shall be provided with limits of not less than ONE MILLION DOLLARS (\$1,000,000.00) per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the Labor Code shall be solely in the discretion of the City Attorney. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

4.2 Commercial General and Automobile Liability Insurance.

- 4.2.1 General requirements.** Consultant, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.
- 4.2.2 Minimum scope of coverage.** Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.
- 4.2.3 Additional requirements.** Each of the following shall be included in the insurance coverage or added as an endorsement at least as broad as Insurance Services Office form number CG 20 10 (11/85 ed.) to the policy:
- a. City and its officers, employees, agents, contractors, consultants, and volunteers shall be covered as insureds with respect to each

of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied, or used by Consultant; and automobiles owned, leased, or used by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City or its officers, employees, agents, contractors, consultants, or volunteers.

- b. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- c. An endorsement must state that coverage is primary insurance with respect to the City and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.
- d. Any failure of CONSULTANT to comply with reporting provisions of the policy shall not affect coverage provided to CITY and its officers, employees, agents, and volunteers.
- e. An endorsement shall state that coverage shall not be suspended, voided, or canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

4.3 Professional Liability Insurance. If Consultant shall be performing licensed professional services, Consultant shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000) covering the licensed professionals' errors and omissions.

- 4.3.1** Any deductible or self-insured retention shall not exceed \$150,000 per claim.
- 4.3.2** An endorsement shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.
- 4.3.3** The policy must contain a cross liability clause.
- 4.3.4** The following provisions shall apply if the professional liability coverages are written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained and evidence of insurance must be provided for at least three years after completion of the Agreement or the work, unless waived in writing by the City.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant must provide extended reporting coverage for a minimum of five years after completion of the Agreement or the work. The City shall have the right to exercise, at the Consultant's sole cost and expense, any extended reporting provisions of the policy, if the Consultant cancels or does not renew the coverage.
- d. A copy of the claim reporting requirements must be submitted to the City prior to the commencement of any work under this Agreement.

4.4 Requirements for All Policies.

- 4.4.1 Acceptability of insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A.
- 4.4.2 Verification of coverage.** Prior to beginning any work under this Agreement, Consultant shall furnish City with certificates of insurance and with original endorsements effecting coverage required herein. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The City reserves the right to require complete, certified copies of all required insurance policies at any time.
- 4.4.3 Subcontractors.** Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.
- 4.4.4 Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement.

During the period covered by this Agreement, only upon the prior express written authorization of the City, Consultant may increase such

deductibles or self-insured retentions with respect to City, its officers, employees, agents, contractors, consultants, and volunteers. The City may condition approval of an increase in deductible or self-insured retention levels with a requirement that Consultant procure a bond, guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to the City.

4.4.5 Notice of Reduction in Coverage. In the event that any coverage required by this section is reduced, limited, or materially affected in any other manner, Consultant shall provide written notice to City at Consultant's earliest possible opportunity and in no case later than five days after Consultant is notified of the change in coverage.

4.5 Remedies. In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Declare Consultant in material breach of the Agreement and terminate the Agreement.

4.6 Waiver. The Risk Manager of the City has the authority to waive or vary any provision of Sections 4.2 through 4.5. Any such waiver or variation shall not be effective unless made in writing.

Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES. Consultant shall indemnify, defend with counsel reasonably acceptable to the City, and hold harmless the City and its officials, officers, employees, agents, contractors, consultants, and volunteers from and against any and all losses, liability, claims, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, to the extent caused, in whole or in part, by the willful misconduct or negligent acts or omissions of Consultant or its employees, subcontractors, or agents, by acts for which they could be held strictly liable, or by the quality or character of their work. The foregoing obligation of Consultant shall not apply when (1) the injury, loss of life, damage to property, or violation of law arises wholly from the negligence or willful misconduct of the City or its officers, employees, agents, contractors, consultants, or volunteers and (2) the

actions of Consultant or its employees, subcontractor, or agents have contributed in no part to the injury, loss of life, damage to property, or violation of law. It is understood that the duty of Consultant to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by City of insurance certificates and endorsements required under this Agreement does not relieve Consultant from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply. By execution of this Agreement, Consultant acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of City, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Section 6. STATUS OF CONSULTANT.

- 6.1 **Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subparagraph 1.3. Otherwise, City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.
- 6.2 **Consultant No Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

Section 7. LEGAL REQUIREMENTS.

- 7.1 **Governing Law.** The laws of the State of California shall govern this Agreement.

- 7.2 **Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws applicable to the performance of the work hereunder.
- 7.3 **Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.
- 7.4 **Licenses and Permits.** Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions and to perform this Agreement. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid business license from City.
- 7.5 **Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the City or this Agreement.

Section 8. TERMINATION AND MODIFICATION.

- 8.1 **Termination.** City may terminate this Agreement at any time and without cause upon written notification to Consultant.

In the event of termination, Consultant shall be entitled to compensation for services performed prior to the effective date of termination as provided in Section 2. City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

- 8.2 **Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall be specified in writing by the City. Consultant understands and agrees that, if City issues such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the City, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.
- 8.3 **Amendments.** The parties may amend this Agreement only by a writing signed by all the parties.
- 8.4 **Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the City. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors listed in the Consultant's proposal, without prior written approval of the City.
- 8.5 **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.
- 8.6 **Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, City's remedies shall include, but not be limited to, any or all of the following:
- 8.6.1 Immediate cancellation of the Agreement;
 - 8.6.2 Retention of the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement prior to cancellation; and
 - 8.6.3 Retention of a different consultant at Consultant's cost to complete the work described in Exhibit A not finished by Consultant.

Section 9. KEEPING AND STATUS OF RECORDS.

- 9.1 **Records Created as Part of Consultant's Performance.** All reports, data, maps, models, charts, studies, surveys, calculations, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this

Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City at any time upon demand of the City. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. Failure by Consultant to deliver these documents to the City within the time period specified by the City shall be a material breach of this Agreement. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are preliminary drafts not kept by the City in the ordinary course of business and will not be disclosed to third parties without prior written consent of both parties. All work product submitted to the City pursuant to this Agreement shall be deemed a "work for hire". Upon submission of any work for hire pursuant to this Agreement, and acceptance by the City as complete, non-exclusive title to copyright of said work for hire shall transfer to the City. The compensation recited in Exhibit B shall be deemed to be sufficient consideration for said transfer of copyright.

9.2 Consultant's Books and Records. Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of three (3) years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.

9.3 Inspection and Audit of Records. Any records or documents that Section 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds TEN THOUSAND DOLLARS (\$10,000.00), the Agreement shall be subject to the examination and audit of the State Auditor, at the request of City or as part of any audit of the City, for a period of three (3) years after final payment under the Agreement.

Section 10 MISCELLANEOUS PROVISIONS.

10.1 Attorneys' Fees. If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.

10.2 Venue. In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Santa Clara or in the United States District Court for the Northern District of California.

- 10.3 **Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.
- 10.4 **No Implied Waiver of Breach.** The waiver of performance or any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 **Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the parties.
- 10.6 **Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.
- 10.7 **Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Sections 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous twelve (12) months, an employee, agent, appointee, or official of the City. If Consultant were an employee, agent, appointee, or official of the City in the previous twelve months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of Government Code §1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of Government Code § 1090 and, if applicable, may be disqualified from holding public office in the State of California.

Consultant certifies that it has not paid any direct or contingent fee, contribution, donation or consideration of any kind to any firm, organization, or person (other than a bona fide employee of Consultant) in connection with procuring this Agreement, nor has Consultant agreed to employ or retain any firm, organization,

or person in connection with the performance of this Agreement as a condition for obtaining this Agreement.

- 10.8 Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.
- 10.9 Ownership of Documents.** All documents developed or obtained by Consultant in the performance of the Agreement shall be deemed to be the property of the City.
- 10.10 Contract Administration.** This Agreement shall be administered by City Engineer, who is authorized to act for, and on behalf of City. All correspondence shall be directed to or through the Contract Administrator or his or her designee.
- 10.11 Notices.** Any written notice to Consultant shall be sent to:
Stason Foster, P.E.
Lowney Associates
405 Clyde Ave
Mountain View, CA 94043-2209
- Any written notice to City shall be sent to:
David M. McNeely, City Engineer
455 East Calaveras Boulevard
Milpitas, California 95035
- 10.12 Professional Seal.** Where applicable in the determination of the City, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation.
- 10.13 Record Drawing.** At the end of construction, the consultant shall prepare a record drawing using the red-lined plans to be provided by the City. The record drawing shall incorporate all changes made during construction in the field to show the actual record of construction.
- 10.14 Integration.** This Agreement, including the exhibits, represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.
- 10.15 Exhibits.** All exhibits referenced in this Agreement are incorporated by reference herein.

CITY OF MILPITAS

CONSULTANT

Thomas J. Wilson, City Manager

[NAME, TITLE]

ATTEST:

Gail Blalock, City Clerk

Taxpayer Identification Number

APPROVED AS TO FORM:

Steven T. Mattas, City Attorney

APPROVED AS TO CONTENT:

Department/Division Head

APPROVED:

Finance Director/Risk Manager

Attachments:

- Exhibit A: Scope of Services
- Exhibit B: Compensation Schedule, personnel and rates
- Exhibit C: Insurance Coverage Documents
- Exhibit D: Sample Progress Payment form

J:\wpd\Mnrsw\500\001\AGREE\Milpitas Standard Consulting Agmt_0730full.doc

Exhibit A, Scope of Services



Mountain View
Fairfield
Oakland
San Ramon
Fullerton

April 6, 2004
P13478

Mr. Tom Yousch
CITY OF MILPITAS
455 East Calaveras Boulevard
Milpitas, CA 95305

**RE: PROPOSAL FOR GEOTECHNICAL AND
ENVIRONMENTAL SERVICES
GREAT MALL PARKWAY / I-880
CAPACITY IMPROVEMENT PROJECT
MILPITAS, CALIFORNIA**

Dear Mr. Yousch:

As requested, we are pleased to present our proposal for geotechnical and environmental services for the Great Mall Parkway / I-880 Capacity Improvement project. Presented below are a discussion of the project and our proposed scope of work.

**Our mission is to
provide you with the
information needed to
make informed
decisions about the
condition of your
property**

THE PROJECT

The project will consist of adding an approximately 500-foot long lane that will widen the existing Southbound (SB) I-880 Off Ramp and construction of a right lane pocket on Great Mall Parkway at the I-880 Northbound On Ramp. The widening of the off ramp may involve adding fill to the existing embankment that was constructed about 5 years ago. The right lane pocket will replace existing concrete hardscape and landscape area at the Northbound On Ramp. Sidewalk Improvements are also planned. We understand that, other than and extending storm drain lines and Inlets and traffic signal work, new utilities will not be added.

SCOPE OF GEOTECHNICAL SERVICES

The project area lies within Caltrans right-of-way for I-880 and VTA right-of-way for Great Mall Parkway. Based on discussions with Mr. Tom Yousch of Swinerton Management and Consulting, we will prepare a Materials Report following Caltrans format criteria.

We will coordinate our site access with Caltrans, VTA and the City of Milpitas and obtain encroachment permits. This will include communication with Caltrans and VTA, correspondence, preparation of encroachment permits, and coordination of site work with their Inspector. For this task we have assumed a level of effort of 12 hours. This proposal does not

Include any permit fees required by Caltrans or VTA. We assume that the permit fees will be waived by the City of Milpitas.

Report Review

We will visit the Caltrans District 4 office and VTA's office to review pertinent reports prepared for the Tasman / I-880 Interchange project that contain information regarding the history of this section of roadway and the structural pavement sections.

Field Exploration

Exploratory Borings: To characterize the subsurface conditions, we will drill, log, and sample five exploratory borings with portable, "Minuteman", solid-stem auger drilling equipment to a depth of 1.5 to 20 feet. Two borings will be drilled in the landscape area for the Great Mall Parkway right turn pocket and the remaining three borings will be drilled in the in the shoulder or landscape areas on the SB I-880 Off Ramp. These borings will be used to determine the existing subgrade soil conditions and collect relatively undisturbed bulk soil samples for both geotechnical and environmental laboratory testing and visual classification. *Coring to confirm existing structural sections is not included.*

We will mark the boring locations and notify you and Underground Service Alert (USA) prior to beginning fieldwork so that public or private underground utilities can be identified. For the purpose of this scope of work, it is the responsibility of utility owners to mark their utilities. We are not responsible for utilities not properly marked at the ground surface. To reduce the risk of damaging unidentified underground utilities during drilling, we will also contract with a private utility locator. Borings will be backfilled with cement grout in accordance with Santa Clara Valley Water District guidelines. Drilling spoils will be spread on site. As discussed before, Caltrans, VTA, and City of Milpitas encroachment permits will be obtained.

Traffic Signage: We will provide traffic signage as required by Caltrans, VTA, and the City of Milpitas to complete our borings. This would include the signage and cones warning cars and pedestrians as required by the encroachment permit. We do not anticipate affecting traffic patterns unless required by Caltrans. *Our costs assume that we can complete the work during daylight hours. Nighttime work, if required, would increase our costs.*

Pavement Condition Survey: We will visually observe the conditions of the existing pavements that the improvements will tie into. The results of this survey will be discussed in our report.

Laboratory Testing

We will conduct laboratory testing on the sampled soils to evaluate the engineering properties. This testing will include 1) moisture contents and dry densities, 2) two Plasticity Index (PI) tests on a representative surficial soil sample to evaluate expansion potential, and 3) two R-value tests on existing materials for pavement design.

**Innovative designs for
cost-effective
construction**

Office Studies

We will review the field and laboratory data and perform engineering analysis to evaluate site earthwork, exterior flatwork and pavements. We will prepare a report that includes the results of our investigation and our conclusions and geotechnical recommendations for design of the proposed roadway improvements. Our report will be in Caltrans materials report outline include a site plan, log of test borings logs, and laboratory test data in addition to the information below. This scope excludes doing a corrosion evaluation because the underground utility work is minor and this work has likely been performed for the current improvements. Since the project is relatively small, we anticipate contractors will obtain the materials from local quarries and batch plants and a list of potential suppliers is not needed.

We will issue a draft of our geotechnical report prior to publishing a final copy so that you can have the opportunity to review the report and discuss any final comments you have. Five hard copies will be provided. We will then incorporate the comments as agreed upon and issue the final report copies. A final color, signed, wet-stamped report copy will be emailed to you in Adobe Acrobat (pdf) format, if desired, so that you have report copies available for distribution at all times.

Site Conditions: We will review and summarize the surface, subsurface, and ground water conditions and the engineering properties of the soils encountered during the site investigation. The report will also discuss the existing improvements and condition.

Earthwork: We will present earthwork criteria, including recommendations for clearing and site preparation, subgrade preparation, compaction, materials for fill, temporary cut and fill slopes, surface drainage and landscaping considerations, as necessary.

Geologic Hazards: We will discuss on a reconnaissance level relative geologic hazards.

Exterior Flatwork: If the results of our Plasticity Index testing indicate that a thicker section of non-expansive fill is indicated than the standard City details, we will include this information in our report.

Pavements: We will present flexible asphalt concrete pavement sections for traffic indices (TI) provided by the City or Caltrans. We have assumed that two TIs will be provided by the City of Milpitas or the project civil engineer. Pavement design will be based on results of R-value testing and the expected properties of import soils.

Materials Specifications: We will provide recommendations for modifications to the City Standard Specifications, where needed to address site specific issues.

Project Meetings

As discussed, we will assume that the geotechnical project manager will attend two, 2-hour meetings with the City to review the results of our investigation.

Plan Review

Typically, we are asked to review the geotechnical aspects of the project plans. We have assumed that we will review the civil plans and specifications. We have allowed up to 4 hours of senior project engineer time.

SCOPE OF ENVIRONMENTAL SERVICES

SOIL QUALITY EVALUATION

The following scope of work was prepared based on our experience with similar projects where Caltrans required an evaluation for aerially deposited lead. We recommend that this scope of work be presented to Caltrans for their approval prior to proceeding with the fieldwork. We have found that obtaining initial input and comments from Caltrans regarding the planned scope of work helps to expedite final project approval.

Subsurface Exploration

We will collect soil samples to evaluate shallow soil for the presence of aerially deposited lead. To save costs and eliminate the need to mobilize a second drill rig, the soil samples will be collected concurrently with our geotechnical investigation discussed above.

Soil samples from five borings will be collected at depth intervals of six inches and 1½ feet, per Caltrans guidelines. Two soil samples from each boring will be submitted for laboratory analysis under chain of custody documentation.

Laboratory Analyses

The ten soil samples will be analyzed at a state-certified laboratory for total lead (EPA Test Method 7420). If the total lead concentration is greater than 50 ppm, but less than 350 ppm, the samples will be analyzed for soluble lead using a waste extraction test (WET EPA Method 1311). If results indicate that soluble lead concentrations are greater than 5 ppm, a modified WET test using deionized (DI) water will be conducted. If total lead concentrations exceed 500 ppm, a Toxicity Characteristic Leaching Procedure (TCLP) analysis will be performed. We have assumed, for purposes of this proposal, that six of the samples will be tested using the WET test, three using the modified DI WET test, and two using the TCLP test. Four of the samples will also be analyzed for pH in conformance with the Caltrans guidelines.

Report and Meetings

We will prepare a soil quality evaluation report presenting the results of our study. The report will include a vicinity map, site plan showing sampling locations, and copies of the records the laboratory reports. The conclusions and recommendations presented in the report will be based on our interpretation of the readily available information gathered, site history and usage data, and our observations of the existing site conditions.

If the site is "clean," we document compliance; if problems exist, we help you weigh business decisions against environmental liabilities

A draft report will be provided for review by the City. We also have assumed that two meetings will be attended to discuss the project and/or comments to the report. A final report will be issued after City comments are incorporated.

FEES AND TERMS

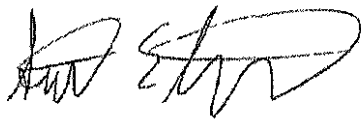
We will perform the above geotechnical and environmental services on a time and expense basis per the attached hourly rate schedule; not-to-exceed fee estimates are presented in Table 1 (attached). This work will be performed per the terms and conditions of a consulting agreement to be negotiated between the City of Milpitas and Lowney Associates. Additional services, if requested by you that are not outlined in this agreement will be charged on a time-and-expense basis.

AUTHORIZATION

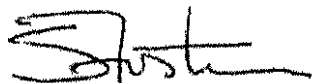
Please acknowledge your receipt of and agreement with the scope and fees in this proposal by forwarding a consulting agreement or notice to proceed with this scope of work attached. As soon as we receive a signed contract, we will begin work.

We look forward to working with you on this important project. Thank you for choosing us to assist you. If you have any questions, please call and we will be glad to discuss them with you.

Very truly yours,

LOWNEY ASSOCIATES

Scott E. Fitinghoff, P.E., G.E.
Associate, Senior Project Engineer
City of Milpitas Point of Contact



Stason I. Foster, P.E.
Principal Environmental Engineer

SEF:SIF:LCK

Copies: Addressee (2)

Attachments: Schedule of Hourly Rates

Copyright © 2004 Lowney Associates

TABLE 1. ESTIMATED FEES FOR GEOTECHNICAL SERVICES**GEOTECHNICAL SERVICES****Geotechnical Investigation** **\$16,700**

- Obtain Caltrans, VTA, and City of Milpitas Encroachment Permits
- Review pertinent reports at Caltrans for Calaveras Boulevard
- Underground Service Alert (USA) Notification
- Private Utility Locator
- Site reconnaissance and Pavement Condition Survey
- Traffic Control Signage
- Five "Minuteman" exploratory borings
- Backfill borings with cement grout
- Laboratory testing
- Engineering analysis
- Drafting and report preparation
- Issue Draft and Final versions of report

Geotechnical Project Meetings **\$600****Plan Review** **\$750**

•

Geotechnical Subtotal **18,050**

Initial to
Authorize**ENVIRONMENTAL SERVICES****Soil Quality Evaluation** **\$1,885****Laboratory Analyses** **\$1,825****Office Coordination, Report Preparation and Meetings** **\$2,790**

•

Environmental Subtotal **\$6,500**

Initial to
Authorize

LOWNEY ASSOCIATES

Environmental/Geotechnical/Engineering Services

Schedule of Hourly Fee Rates Prevailing Wage Through January 31, 2005

Senior Principal Engineer or Geologist	\$189.00
Principal Engineer or Geologist	\$176.00
Senior Project Engineer or Geologist	\$149.00
Project Engineer or Geologist	\$142.00
Project Industrial Hygienist	\$142.00
Senior Staff Engineer or Geologist	\$129.00
Staff Engineer or Geologist	\$119.00
Senior Supervisory Technician	\$119.00
Supervisory Technician	\$116.00
Engineering Technician	\$109.00
Dispatcher/Lab Technician	\$89.00
Technical Illustrator	\$73.00
Technical Assistant	\$73.00
Administrative Clerk	\$69.00

Equipment Charges

Field Vehicle	\$7.50 per hour
Laboratory Equipment	\$11.50 per hour
Nuclear Moisture-Density Gauge	\$7.50 per test
Global Positioning System (GPS)	\$95.00 per day
Slope Inclinator	\$160.00 per day
Organic Vapor Meter	\$105.00 per day
Depth Sounder	\$30.00 per day
55-gallon drum	\$50.00 each
Modeling Software	\$15.00 per hour
AutoCad Illustration Software	\$20.00 per hour
Plotter	\$5.00 per plot

Charges for employees will be made in accordance with the Schedule of Hourly Fee Rates. These rates are subject to change in February 2005. For other than professional employees, time spent over 8 hours per day and on Saturdays will be charged at 1.5 times the hourly billing rate. Work on Sunday will be charged at 2.0 times the hourly billing rate, and holiday work will be charged at 2.5 times the hourly billing rate. All field personnel charges are portal to portal. Professional employees do not make premium charges for overtime work. Services performed under fixed fee contracts will be charged at the agreed fixed fee. For time and materials contracts, expenses and other similar project-related costs are billed at cost plus 18.5 percent.

Payment for Work and expenses shall be due and payable upon receipt of Lowney's statement. To be recognized, any dispute over charges must be claimed in writing within thirty (30) days of the billing date. Disputes or questions about a statement shall not be cause for withholding payment for remaining portions due. Amounts unpaid thirty (30) days after the issue date of Lowney's statement shall be assessed a service charge of one (1) percent per month on balances outstanding to compensate Lowney for the cost and burden of administering the account and collecting fees owed.

Lowney understands that Work subject to this Agreement constitutes a "public work" under any and all federal, state, and/or local prevailing wage laws, and that Lowney is obligated to pay prevailing wages and benefits and/or any other predetermined wages or benefits.

EXHIBIT B
(COMPENSATION MANNER AND AMOUNT)

The maximum amount of compensation for basic services to be paid to CONSULTANT under this AGREEMENT, including both payments for professional services and reimbursable expenses, shall not exceed **twenty seven thousand dollars (\$27,000.00)**. Consultant shall not exceed the following dollar amounts for each work task:

Geotechnical Services	\$ 52,850.00
Geotechnical Project Meetings	\$ 26,600.00
Plan Review	<u>\$ 750.00</u>
Geotechnical Subtotal	\$ 18,050.00
Environmental Services	
Soil Quality Evaluation	\$ 1,885.00
Laboratory Analysis	\$ 1,825.00
Office Coordination, Report Preparation, Meetings	<u>\$ 2,790.00</u>
Environmental Subtotal:	\$ 6,500.00
Sub-total:	\$ 24,550.00
City Contingency:	\$ 2,450.00
TOTAL:	\$ 27,000.00

Consultant may shift allocation of budget among tasks with prior written approval of the CITY.

* CONSULTANT shall, during the term of this AGREEMENT, invoice CITY every month for services performed under this AGREEMENT during the previous month period. Providing the services covered by the invoice have been completed in accordance with the provisions of this AGREEMENT, CITY shall pay CONSULTANT the amount shown on the invoice within thirty (30) days of receipt of the invoice. Ten (10) percent shall be retained by the CITY from each contract billing until the completion of the contract. This retention shall be released to the CONSULTANT upon completion of each contract work task (as specified in Exhibit A), to the satisfaction of the CITY. Upon completion of each work task, CONSULTANT shall submit a separate letter requesting release of retention for that task.

The monthly invoice shall describe the topics and tasks completed during by consultant and sub-consultants. The invoice shall list the hours expended with personnel charge rates, and reimbursable expenses, in accordance with "Item B - Rate Schedule", incorporated herein. The hourly rates shown on each schedule are fixed for the project. The invoice shall also show the total to be paid for the invoice period. A budget summary shall be included on the front page of the invoice and shall show the total budget amount, total amount billed to date, and the budget balance. A spreadsheet (attached) shall be used to record the monthly invoices and shall be attached to each invoice.